Supreme Court, U.S.
DEC 31 2003
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(13)

No. 02-572

IN THE

Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Section 1782 of Title 28 authorizes federal district courts to order discovery "for use in a proceeding in a foreign . . . tribunal, including criminal investigations conducted before formal accusation." The questions presented are:

1. Whether section 1782 entitles a private antitrust complainant to pre-litigation civil discovery in the United States that would be unavailable both (a) under any provision of U.S. law if the complaint had been lodged with U.S., rather than foreign, law enforcement authorities and (b) under the law of the foreign jurisdiction itself if the evidence were located there rather than in the United States.

2. Whether section 1782 allows civil discovery by a private person when no "proceeding" before a foreign "tribunal" is pending or even imminent.

PARTIES TO THE PROCEEDINGS

The only parties to this proceeding are identified in the caption.

RULE 29.6 STATEMENT

Petitioner Intel Corporation is a publicly traded corporation, and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 292 F.3d 664. The opinion of the district court (Pet. App. 13a-15a) is unreported.

JURISDICTION

The court of appeals entered its decision on June 6, 2002. A timely petition for rehearing or rehearing en banc was denied on September 3, 2002 (Pet. App. 11a). The petition for a writ of certiorari was filed on October 11, 2002, and was granted on November 10, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

INTRODUCTION

Section 1782 of Title 28, entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," authorizes a federal district court to grant discovery "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." Congress's express purpose in enacting this provision was to promote international comity by "adjust[ing U.S.] procedures to the requirements of foreign practice and procedure." S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788. The statute is thus designed to place courts and litigants in a foreign country, when seeking evidence available only in the United States, in a position similar to the one they would occupy if the evidence were located in the litigation forum's country. Congress hoped to encourage foreign governments to reciprocate by adjusting their own procedures to accommodate the rules of litigation in the United States. As discussed below, Congress's ultimate objective was to foster a system of international cooperation that respects the rules of different legal regimes by making the geographic location of a document or person largely immaterial to the particular fact-finding process established by the "tribunal" conducting the "proceeding."

Respondent Advanced Micro Devices, Inc. ("AMD") seeks to use section 1782 to obtain civil discovery in the United States concerning its closest competitor, petitioner Intel Corporation. AMD is not, however, a litigant in any "proceeding" before a foreign "tribunal." Instead, AMD claims entitlement to such discovery on the grounds that it has *complained about* Intel to a law enforcement agency—the Commission of the European Communities ("Commission" or "EC")—and that the EC's current "pre-investigation" might someday ripen into an actual "proceeding" before some European "tribunal." It is undisputed, however, that European law would not authorize AMD to obtain the requested documents if they were in Europe rather than the United States. Indeed, AMD would have no

right to obtain those documents under European law even if a "proceeding" were one day to arise out of the current investigation. It is similarly undisputed that AMD, as a non-litigant, could not claim entitlement to those documents under U.S. law simply by asserting that it may some day initiate an actual "proceeding" before a U.S. "tribunal." AMD thus implausibly argues that section 1782 enables private parties to circumvent the fundamental American rule against pre-litigation private discovery simply by filing a complaint with a law enforcement authority in a foreign jurisdiction that *likewise* precludes such discovery (as well as discovery during any litigation that might ensue).

Treating section 1782 as a font of "liberal discovery" (Pet. App. 8a), the Ninth Circuit nonetheless ruled for AMD. It held, in essence, that a private non-litigant may use the federal courts to conduct, for the ostensible benefit of a foreign law enforcement authority, a massive fishing expedition that is otherwise forbidden under U.S. law and that, for sound policy reasons, the foreign authority itself would not authorize if the evidence in question were within its jurisdiction. And the Ninth Circuit separately held that such discovery is available where, as here, no "proceeding" before a foreign "tribunal" is underway or even imminent. Under the logic of that approach, any company wishing to discover its competitors' most sensitive corporate documents could obtain them under section 1782 simply by announcing a present intention to trigger adjudicative proceedings somewhere in the world at some point in the future.

In each respect, the Ninth Circuit's position conflicts with the text, history, and purposes of section 1782. Indeed, as the EC itself makes clear in its nearly unprecedented amicus brief on the merits, the construction adopted by the court of appeals would subvert the very comity objectives that prompted Congress to enact this statute. It would, in particular, (i) "undermine the European Community's carefully balanced policies regarding the disclosure of confidential information," (ii) "encourage companies to file pretextual complaints with the Commission solely in order to use Sec-

tion 1782, wasting the Commission's scarce resources," (iii) imperil key EC programs "by jeopardizing the Commission's ability to maintain the confidentiality of documents submitted to it," and (iv) "greatly burden the Commission and other foreign sovereigns by requiring them to monitor and appear in district court proceedings throughout the United States in order to explain their interests in blocking such requests."[1]

STATEMENT

1. The History of Section 1782

Congress enacted the principal precursor to section 1782 in 1948. As slightly amended in 1949, the statute provided:

> The deposition of any witness residing within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found. The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.

Act of June 25, 1948, Pub. L. No. 80-773, § 1782, 62 Stat. 869, 949, *as amended by* Pub. L. No. 81-72, § 93, 63 Stat. 89, 103 (1949).[2] The types of discovery permitted under section 1782

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[1] Brief of Amicus Curiae The Commission of the European Communities Supporting Reversal 4-5 (filed Dec. 23, 2003) ("EC Amicus Br.").

[2] Under the previous, Civil-War era "letters rogatory" statute, United States courts were authorized to order discovery for use in foreign proceedings only to assist suits "for the recovery of money or property" in which a foreign country was a "party" or "ha[d] an interest." 12 Stat. 769, 769 (1863). Under these restrictive terms, the federal courts generally denied foreign requests for such assistance. *See* Walter B. Stahr, *Discov-*

were significantly more limited than under the current version of section 1782. Because the statute authorized only "deposition[s]," *id.*, district courts were generally without authority to order the production of documents located within the United States. Moreover, district courts could order such depositions only for the benefit of a "*court* in a foreign country," *id.* (emphasis added), a concept that excluded a broad range of foreign adjudicative and quasi-adjudicative tribunals.

As the volume of litigation with international aspects grew in the postwar era, Congress perceived an increasing need for greater collaboration between the United States and other countries in such discovery-related matters. Congress responded to that need by forming a Commission on International Rules of Judicial Procedure ("Commission") and authorizing it to "study existing practices of judicial assistance and cooperation between the United States and foreign countries" with an eye toward improving "the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743 (1958). The Commission recommended an overhaul of section 1782, which Congress ultimately adopted in 1964. The new statute provided, in relevant part:

> **§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals**
>
> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct

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ery Under 28 U.S.C. § 1782 for Foreign and International Proceedings, 30 VA. J. INT'L L. 597, 601-602 (1990).

> that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

Pub. L. No. 88-619, § 9(a), 78 Stat. 995, 997 (1964).

Congress undertook these comprehensive revisions to section 1782 as part of a broader effort to "bring[] the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby provid[e] equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects."[3] True to that goal, this new section 1782 promoted comity between the U.S. and other countries by expanding the scope of discoverable evidence to include "document[s]" and "other things" as well as deposition testimony; by providing that such discovery could be ordered for use not just in foreign "courts," but also in foreign "administrative tribu-

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[3] Letter of Oscar Cox, Chairman, Commission on International Rules of Judicial Procedure, to Hon. John W. McCormack, Speaker, U.S. House of Representatives, May 28, 1963, attached to S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3793. Congress took these steps largely in the hope "that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures." *Id.*; *see also* Fourth Annual Report of the Commission on International Rules of Judicial Procedure, H. Doc. No. 88, 88th Cong., 1st Sess. 9 (1963) ("It is equally important to secure parallel and compatible improvements in the procedures of other countries. The Commission's work would be less than half done if we made all the necessary changes at home to aid courts and litigants abroad and ignored the need for similar changes abroad necessary to aid United States courts and litigants.").

nal[s]," "quasi-judicial agenc[ies]," and criminal "proceedings pending before investigating magistrates," *id.*[4]; and by "adjust[ing U.S.] procedures to the requirements of foreign practice and procedure." S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

Whereas Congress expressed its clear intent to "assist[] foreign and international tribunals and litigants" and to "adjust[]" U.S. procedures to match foreign procedures, *see id.* at 3788, it left no trace of any contrary intent to *disregard* those tribunals' procedures by granting discovery that would be precluded if the evidence were located physically within their jurisdiction rather than in the United States. There is, in particular, no suggestion anywhere in the legislative record that Congress wished to give private non-litigants like AMD a new right to obtain *pre-litigation civil* discovery, which is almost always unavailable both here and abroad. *See* pp. 19-20, *infra*. Although Congress authorized "any interested person" to seek discovery under section 1782, Congress used that language because the class of persons entitled to invoke the statute extends beyond litigants to include officials acting on behalf of a foreign sovereign.[5]

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[4] In discussing the need to grant assistance to "investigating magistrates," the Senate Report cited an address by the French consul general in New York regarding the difficulty that French *juges d'instruction* had encountered in receiving discovery assistance from United States courts under the pre-amendment version of section 1782. *See* 1964 U.S.C.C.A.N. at 3788 (*citing* Lelièvre, Address, in *Letters Rogatory* 13 (B. Grossman ed. 1956)). The role of these *juges d'instruction* in the French judicial system is confined to criminal matters. *See* Gene D. Cohen, *Comparing the Investigating Grand Jury with the French System of Criminal Investigations: A Judge's Perspective and Commentary*, 13 TEMP. INT'L & COMP. L.J. 87, 88-89 (1999).

[5] *See* 1964 U.S.C.C.A.N. at 3789 ("A request for judicial assistance under the proposed revision may . . . be made in a direct application by an interested person, such as a person designated by or under a foreign law, or a party to the foreign or international litigation."); *see also In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1154-1155 (11th Cir. 1988). Indeed, as discussed below (at note 14), each time the legislative history discusses the class of private

Beyond that narrow subclass, section 1782 is designed to accommodate, as the provision's title itself confirms, the needs of "foreign and international tribunals and [of] *litigants* before such tribunals." 28 U.S.C. § 1782 (title) (emphasis added).

Confirming the same conclusion is a companion provision, 28 U.S.C. § 1696, that Congress also enacted in 1964 as part of the same legislative package that included section 1782. Section 1696 authorizes a federal district court to "order service . . . in connection with a proceeding in a foreign or international tribunal" pursuant to a "request made[] by a foreign or international tribunal or upon application of *any interested person*." 28 U.S.C. § 1696(a) (emphasis added). In that context, the class of private parties qualifying as "interested persons" *must be* confined to litigants, because of course there is no "process" to serve in the private civil context unless litigation has commenced. As is the case under section 1782, public officials who seek process before litigation—such as prosecutors seeking discovery before indictment—would also qualify as "interested persons."

In 1996 Congress amended section 1782 once more, in part to accommodate the needs of the international tribunals for Yugoslavia and Rwanda. Congress added what is now the final clause to the first sentence of section 1782(a), expanding the class of foreign matters for which discovery may be ordered to include "criminal investigations conducted before formal accusation." National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 186, 486 (1996). Congress made no similar provision for the taking of pre-litigation civil discovery by private parties.

2. AMD's Complaint to the EC

The foreign law enforcement inquiry on which respondent AMD has predicated its request for section 1782 dis-

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applicants entitled to seek discovery under section 1782, it identifies them as "litigants."

covery is a "preliminary investigation" (Pet. App. 3a-4a) by the EC. AMD triggered this investigation by complaining to the Directorate General for Competition—the EC's administrative department responsible for competition policy and enforcement—that Intel had engaged in anticompetitive practices in violation of Articles 81 and 82 of the European Community Treaty, which are roughly equivalent to Sections 1 and 2 of the Sherman Act. Because the structure of EC antitrust investigations is key to a proper understanding of this case, we discuss it in some detail before we address AMD's specific request for pre-litigation civil discovery.

a. Through the Competition Directorate General, the EC enforces the European Community's antitrust regime. In the field of competition, the EC performs both law enforcement functions, including the investigation and prosecution of alleged infringements of Articles 81 and 82, and regulatory functions, including the promulgation of rules and guidelines implementing the legal regime.

In performing its law enforcement functions, the EC wields extensive powers to investigate violations of Articles 81 and 82. Among other things, it is empowered to conduct "dawn raids"—on-site inspections at companies' premises conducted without prior notice. J.A. 91. It is also empowered, under Article 11 of European Economic Community Council Regulation 17, to issue requests for documents and for answers to written questions (these are known as "Article 11 requests") and to compel responses to such requests through various sanctions. *Id.* In part because the EC has such extensive authority to obtain directly for itself any information it deems relevant, it relies on its investigative powers to obtain documents from companies under investigation and does not depend upon private complainants to conduct that function on its behalf. J.A. 95.

Accordingly, complainants to the EC have limited rights. Under applicable European law, complainants are "limited to a role which corresponds to the position, under criminal procedure, of a person who reports a matter to the authorities." *AKZO Chemie BV* v. *E.C. Comm'n*, [1987] 1

C.M.L.R. 231, 248. Complainants have no discovery rights and "may not in any circumstances be given access to documents containing business secrets" of a competitor. *Id.* at 259. Indeed, complainants have no right to view any documents submitted to the EC during a preliminary investigation of the type now pending. J.A. 93-94.

Upon the receipt of any complaint charging anticompetitive practices, the EC conducts a preliminary inquiry before deciding whether to take more formal prosecutorial steps. J.A. 90-91. At the conclusion of this preliminary investigation, the EC may proceed on the complaint only if it concludes *both* that a violation of Article 81 or 82 may have occurred *and* that such violation is "significant enough" to warrant further attention. J.A. 50. If the EC eventually decides *not* to expend its prosecutorial resources by proceeding to this second stage, the complainant may then appeal to the European Court of First Instance, which would exercise limited review of this *nol pros* decision and, at most, would remand the matter back to the EC for additional investigation. *See* Pet. App. 4a. In the event of such an appeal, the complainant may be granted very limited access to the Commission's file on the complaint, but even then the complainant is never entitled to access to the confidential documents of the party under investigation. J.A. 92-94. If, on the other hand, the EC has reason to believe both that a violation may have occurred and that such violation is worthy of its prosecutorial resources, it launches a second stage of its inquiry by issuing a so-called Statement of Objections. J.A. 50, 127. In this more formal stage, the *party under investigation* (as opposed to the complainant) has the right to request a non-public hearing to present its views to the EC. J.A. 94.

Although (as discussed below) the Ninth Circuit erroneously found otherwise, the EC continues to act in this second phase as a law enforcement agency, not as an adjudicator. In particular, "[a]n accurate understanding of the European Commission's nature and functions should rule out any application of the term 'tribunal' to it." EC Amicus Br. 3. As

in the first phase, the EC's second-phase investigation "does not constitute adversary proceedings between the companies concerned." *British Am. Tobacco Co.* v. *E.C. Comm'n*, [1988] 4 C.M.L.R. 24, 56. A complainant has no discovery rights whatsoever and, indeed, has no right of access even to submissions to the EC itself. J.A. 96. If a hearing is held, no rules of evidence apply, and the EC makes no provision for taking testimony under oath, compelling the testimony of material witnesses, or cross-examining any witness. J.A. 95-96. Although the complainant may observe the hearing, this "limited, observer's role . . . in no way marks the Commission's proceedings as adjudicative." EC Amicus Br. 8.

The EC also maintains no separation of prosecutorial and decisionmaking functions in either the first or the second phase of the investigation. The EC does not employ judges or any other independent decisionmakers to resolve substantive disputes between its investigating case officers and companies under investigation; instead, the same investigators that conduct "dawn raids" may themselves prepare the EC's decision. J.A. 96.[6] Simply put, the EC "is an arm of

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[6] The court below mistakenly assumed that an advisory committee of EC member states drafts the ultimate EC decisions as a neutral decisionmaker. Pet. App. 4a, 6a-7a. In fact, the EC advisory committee does not draft the EC's decisions; such decisions, including all determinations of law and fact, are prepared instead by the investigative staff. J.A. 91; *see* EC Regulation 17, Art. 10(5) (J.A. 38) (requiring that notice to advisory committee must enclose "a preliminary draft decision"). Because the advisory committee performs only an "advisory task," moreover, it does not conduct an independent review of the evidence gathered in the investigation and instead is merely "informed of the main points of fact and law" by the EC's staff. *Radio Telefis Eireann* v. *E.C. Comm'n*, [1991] E.C.R. II-485, 499-500; *see also* EC Regulation 17, Art. 10(6) (J.A. 38-39). And the EC is free to disregard the advisory committee's advice in any event. *See, e.g., France* v. *E.C. Comm'n*, [1998] 4 C.M.L.R. 829, 860 n.58. The court was also incorrect in assuming that an independent hearing officer issues a recommended decision *on the merits* to the EC. Pet. App. 4a. To the contrary, the hearing officer reports to the EC solely on "procedural issues." Commission Decision of May 23, 2001, 2001 O.J. (L 162/21), Art. 13 (J.A. 25).

the executive and *nothing like a tribunal*." *Hasselblad (GB) Ltd.* v. *Orbinson*, [1985] Q.B. 475, 480 (emphasis added).[7]

b. On October 23, 2000, AMD complained to the EC about Intel's alleged violations of the European Union's competition laws. J.A. 98. Three months later, on January 18, 2001, the EC sent Intel an Article 11 request for information. *Id.* The request asked Intel to produce documents and answer questions related to AMD's general allegations. *Id.* Intel replied to the request on February 28, 2001. *Id.* Three months later, the EC provided Intel with a redacted copy of AMD's complaint and gave Intel an opportunity to respond to it. J.A. 99. In August 2001 Intel provided the EC, but not AMD, a response to AMD's redacted complaint. *Id.* The EC has not asked Intel to answer any further Article 11 requests, and the investigation remains in this preliminary phase. *Id.* Although the EC has provided AMD with a redacted copy of Intel's reply to the Article 11 request, it has never given AMD—and AMD has no legal right to receive—Intel's subsequent response to AMD's complaint. J.A. 93-94. Neither Intel nor AMD has been provided with copies of any other submissions made by the other to the EC. For example, Intel itself has never been given access to an expert report submitted by AMD with its Complaint to the EC. It also has not been given access to additional submissions made by AMD after its original complaint. There is no process, and no obligation, for complainants and companies under investigation to serve each other with their submissions to the EC. J.A. 96.

During this preliminary inquiry, "AMD encouraged the Commission to seek *for itself* the documents specified in

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[7] *See also id.* at 497 (holding that "the [EC] is acting in a manner which is dissimilar to that of either civil or common law courts of justice" and is "better labelled as administrative rather than judicial or quasi judicial"); European Commission Eleventh Report on Competition Policy (Commission's "procedure relating to restrictive practices and abuse of a dominant position is administrative and not judicial; it must not be turned into a trial") (J.A. 35).

AMD's Section 1782 request" (EC Amicus Br. 6 (emphasis added))—documents that Intel had earlier produced in unrelated litigation in the United States with a company called Intergraph Corporation.[8] But "the Commission, exercising its investigative discretion, has declined to do so." *Id.*

3. AMD's Efforts to Obtain Pre-Litigation Civil Discovery under Section 1782

On October 1, 2001, AMD took its discovery request to this country and applied for discovery under 28 U.S.C. § 1782. J.A. 40. AMD asked the district court to compel Intel, ostensibly for the EC's use in the ongoing preliminary investigation, to produce to AMD the very documents from the *Intergraph* proceeding that the EC itself had declined to pursue. J.A. 41-42. The total volume of documents sought by AMD has been estimated at approximately 600,000 pages. J.A. 122. Intel argued in response that section 1782 does not authorize such discovery because, among other considerations, AMD is not currently a litigant in a "proceeding" before a "tribunal" and, in any event, AMD has no right to documents that are not discoverable under the law of the foreign jurisdiction for whose benefit they are supposedly sought.

The district court denied AMD's application. Pet. App. 15a. The court emphasized that AMD's complaint to the EC "is in the initial stage of preliminary inquiry" and that the EC, "in the conduct of an investigation, performs the functions of investigator, prosecutor and decision-maker without any separation." *Id.* at 14a. The court thus concluded that the EC does not conduct adjudicative "proceedings" and is not a "tribunal" for purposes of section 1782. *Id.*

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[8] In that lawsuit, Intergraph had accused Intel of patent infringement as well as various other state and federal law violations, including antitrust violations. Intel prevailed on the merits of the antitrust claims in that suit. *Intergraph Corp.* v. *Intel Corp.*, 88 F. Supp. 2d 1288 (N.D. Ala. 2000), *aff'd*, 253 F.3d 695 (Fed. Cir. 2001).

The court of appeals reversed. It held that, to qualify for discovery under section 1782, AMD need not be a litigant in an ongoing or even imminent foreign adjudicative proceeding. It is enough, the court reasoned, that the current preliminary investigation may eventually "lead[] to quasi-judicial proceedings," in that an ultimate EC decision to prosecute would trigger a more formal second-stage inquiry and a decision not to prosecute would be subject to judicial review. Pet. App. 6a. In the court's view, the second-stage EC inquiry is sufficiently "quasi-judicial" that its prospect triggers discovery rights in the United States under section 1782, even though the EC does not separate its prosecutorial and decisionmaking functions in competition investigations, Pet. App. 14a, and never conducts "adversary proceedings between the complainant and the undertaking concerned," *AKZO Chemie*, [1987] 1 C.M.L.R. at 248. Finally, rejecting the need for any "threshold showing . . . that what is sought be discoverable in the foreign proceeding," the court found it inconsequential that EC procedures categorically deny AMD the very discovery that it seeks, supposedly for the benefit of the EC, through United States law. Pet. App. 7a-8a.[9]

SUMMARY OF ARGUMENT

It is undisputed that, even if the documents AMD seeks were located within the EC's jurisdiction rather than in the United States, AMD would have no right to obtain them under EC law. Such private party discovery is unavailable in connection with EC antitrust investigations because the EC has deliberately chosen to keep such investigations from becoming adversarial proceedings. It is likewise undisputed

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[9] The Ninth Circuit subsequently denied Intel's motion to stay the proceedings pending disposition of the petition for certiorari. It remanded the case back to the district court to resolve questions about, among other things, the discoverability of particular categories of documents under general discovery principles. Although a magistrate judge has issued recommendations on these issues, the district court has held those questions in abeyance pending this Court's review.

that if AMD had complained about Intel to U.S. antitrust authorities rather than to the EC, it would have no right under any provision of U.S. law to obtain these documents. AMD has not filed suit against Intel and thus has not assumed the responsibilities of becoming an actual *litigant*; it is instead a mere complainant to a law enforcement authority. And, with very narrow exceptions inapplicable here, private entities have never had any right to obtain prelitigation civil discovery from prospective defendants. The principal question in this case is thus whether section 1782 entitles AMD to obtain such discovery, which is otherwise unavailable under both U.S. law and EC law, because of the geographical happenstance that the *investigation* is in Europe but the *documents* are with Intel in the United States.

It does not. Congress enacted section 1782 to place tribunals and litigants abroad in a position similar to the one they would occupy, for discovery purposes, if the evidence they seek were located in the foreign jurisdiction rather than in the United States. And Congress hoped that foreign tribunals would likewise adjust their procedures to reflect those of the United States when they consider requests for discovery for use in this country's courts. Congress thereby sought to promote a system of international cooperation that would respect the particular discovery rules of each jurisdiction, while diminishing the role that the geographic location of evidence would otherwise play in litigation with international aspects. Congress did not intend to *magnify* the importance of geographic location by granting parties far greater discovery rights when the evidence sought (or its owner) happens to be located *outside*, rather than inside, the jurisdiction where the discovery would be used. That, however, is the jarringly anomalous result AMD seeks in this case.

AMD's position is as inconsistent with the text and legislative record of section 1782 as it is with the basic comity goals of the statute. As its very title makes clear, section 1782 was enacted to render "[a]ssistance to foreign and in-

ternational tribunals and to *litigants* before such tribunals," not to mere complainants like AMD. Indeed, the last two sentences of the provision's first paragraph expressly contemplate that, in considering a discovery application, the district court will be guided either by "the practice and procedure of the foreign country or the international tribunal" or by "the Federal Rules of Civil Procedure." Nowhere did Congress express any intent to create a new species of pre-litigation civil discovery available neither in this country nor abroad. The 1996 amendment—which Congress added to ensure the availability of discovery to aid foreign "criminal investigations conducted before formal accusation"—further demonstrates that Congress wished to limit pre-litigation discovery to the one context in which it is common, both here and abroad: in *criminal* investigations, conducted by foreign sovereigns or their agents. AMD's contrary interpretation, which assumes that the preexisting text already permitted pre-litigation discovery of all kinds, would strip the 1996 amendment of any significance. And the statute's legislative history, as well as the parallel provision of 28 U.S.C. § 1696, likewise identifies the class of private section 1782 applicants as "litigants" before foreign tribunals.

Quite apart from these considerations, AMD's section 1782 application should be denied for the independent reason that no "proceeding" is now underway "in a foreign or international tribunal," and the prospect that any given "proceeding" may arise sometime in the future is entirely speculative. The Second Circuit has repeatedly held, and the Eleventh Circuit has likewise indicated, that discovery under these circumstances should be denied as inconsistent with the statutory purpose. Indeed, AMD's contrary position would once more reduce the 1996 amendment to surplusage. If the pre-amendment text already permitted discovery before the commencement of a foreign "proceeding," Congress would not have needed to act in 1996 to "includ[e] criminal investigations before formal accusation" within the scope of foreign inquiries that trigger section 1782 discovery rights. Taken to its logical conclusion, AMD's approach would permit anyone to obtain a rival's documents in the United States, even

in the absence of a foreign *investigation*, upon declaring an intent to trigger such an investigation (or file a lawsuit) at some indefinite point in the future. But Congress did not enact section 1782 as a private-sector counterpart to the Freedom of Information Act, under which anyone could obtain a private company's corporate documents on the thinnest pretext.

In sum, AMD's position in this case contradicts the text, purpose, and legislative record of section 1782, and this Court can and should reverse the Ninth Circuit's decision on that basis alone. But even if the Court were to conclude that the traditional tools of statutory construction do not compel that outcome, it should exercise its supervisory authority to do in this procedural context what it and the courts of appeals have often done: "mandate 'procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.'" *Thomas* v. *Arn*, 474 U.S. 140, 146-147 (1985) (citation omitted) (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). Specifically, like several courts of appeals, this Court should adopt rules of practice that preclude private non-litigants from obtaining section 1782 discovery either (i) where such discovery would be unavailable in the foreign jurisdiction if the documents were located there or (ii) where there is no live foreign "proceeding."

The alternative to clear rules of practice is a regime in which district courts are permitted broad discretion to resolve these internationally significant issues on an unpredictable, case-by-case basis. But that regime, as the EC observes, would "offend[] principles of comity by placing heavy and inappropriate burdens on foreign countries and their agencies." EC Amicus Br. 16. There is no mechanism by which a foreign sovereign can keep track of section 1782 litigation that might affect its interests. And in all events "that very notion—that a sovereign government should be obliged to appear regularly in courts across the United States to explain itself and its objections to Section 1782 discovery—is contrary to principles of comity." *Id.* at 17.

ARGUMENT

Granting AMD the pre-litigation civil discovery it seeks would be inappropriate for two independent reasons. First, section 1782 does not authorize a private non-litigant to come to a U.S. court to obtain, for the ostensible benefit of a foreign law enforcement authority, massive discovery that it could not otherwise obtain under U.S. law and that the foreign authority itself would not authorize the non-litigant to receive if the evidence in question were within its jurisdiction. Second, such discovery is unavailable in any event where, as is undeniably the case here, there is no live "proceeding in a foreign . . . tribunal" in the first place. We address these separate points in Sections I and II respectively.

I. SECTION 1782 DOES NOT AUTHORIZE DISCOVERY THAT WOULD OTHERWISE BE UNAVAILABLE TO PRIVATE NON-LITIGANTS UNDER BOTH U.S. LAW AND FOREIGN LAW.

1. Two undisputed facts frame the legal issues in this case. *First*, it is undisputed that EC law would not permit AMD to obtain discovery of these documents even if they were within the EC's jurisdiction rather than in the United States. J.A. 95-96; *see also* AMD Br. in Opp. to Cert. 25-30 & n.14 (leaving this point uncontested, and asserting only that the EC itself, rather than private parties like AMD, could obtain this discovery). In part because the EC has made a deliberate policy choice to avoid "adversary proceedings between the companies concerned," *British Am. Tobacco Co.*, [1988] 4 C.M.L.R. at 56, private parties cannot gain access to a rival's documents in Europe by complaining about the rival to EC antitrust authorities—just as they cannot gain access to those documents in this country simply by complaining to antitrust officials in the Department of Justice.

Second, and more generally, it is undisputed that if AMD were pursuing this matter in the United States, U.S. law would preclude it from obtaining discovery of Intel's documents, for the simple reason that AMD has not filed suit against Intel and is not a litigant against Intel in any rele-

vant proceeding. With extremely narrow exceptions inapplicable here,[10] pre-litigation discovery is unavailable to private entities. Indeed, it is axiomatic that non-litigants may not exploit the court system to conduct "a fishing expedition to prepare for filing," *In re Solorio*, 192 F.R.D. 709, 709-710 (D. Utah 2000), or otherwise "to ascertain facts for use in framing a complaint," *In re Gary Constr., Inc.*, 96 F.R.D. 432, 433 (D. Colo. 1983).

In a nutshell, the issue in this case is whether section 1782 permits a private non-litigant to circumvent that basic premise of American law, and to scrutinize the private documents of its corporate rivals, through the simple expedient of complaining about those rivals to a law enforcement authority in a foreign jurisdiction that *likewise* precludes such pre-litigation civil discovery. The answer, as several circuits have found, is no: section 1782 does not enable *non*-litigants to trawl for documents that they could not obtain under the laws of either the United States or the foreign jurisdiction on whose behalf the discovery is supposedly sought. The First Circuit has explained, among other things, that construing section 1782 to permit parties to sidestep foreign discovery limitations would "place United States litigants in a more detrimental position than their op-

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[10] Under the Federal Rules of Civil Procedure, requests for discovery made "before litigation has commenced" are governed by Rule 27. *See Tennison* v. *Henry*, 203 F.R.D. 435, 440 (N.D. Cal. 2001). Unlike Rule 26, which governs ordinary discovery taken after litigation has commenced, Rule 27 permits pre-litigation discovery only in the form of "depositions" and only where the party wishing to take them can prove "that there is a 'significant risk' that the evidence will be lost if it is not perpetuated." *Id.*; *see also Nevada* v. *O'Leary*, 63 F.3d 932, 936 (9th Cir. 1995) (Rule 27 may be used only to perpetuate limited and important "known testimony" that will otherwise be lost); *In re Solorio*, 192 F.R.D. 709, 709-710 (D. Utah 2000); *In re Gary Constr., Inc.*, 96 F.R.D. 432, 433 (D. Colo. 1983) (purpose of Rule 27 is "to prevent a failure or delay of justice," not to allow general discovery for use in framing a complaint) (internal citation omitted); *In re Boland*, 79 F.R.D. 665, 668 (D.D.C. 1978) ("it is well settled that Rule 27(a) 'is not a method of discovery to determine whether a cause of action exists'") (internal citation omitted).

ponents when litigating abroad"; that "[t]his result would be contrary to the concept of fair play embodied in United States discovery rules" and in section 1782 itself; and that, even "more importantly, foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws." *In re Asta Medica, S.A.*, 981 F.2d 1, 6 (1st Cir. 1992).[11]

As its title makes clear, section 1782 was enacted to render "[a]ssistance to foreign and international tribunals and to *litigants* before such tribunals." 28 U.S.C. § 1782 (title) (emphasis added). Congress specifically wanted to remove jurisdictional obstacles to the production of evidence that, but for its physical presence only in the United States, would be subject to discovery in a foreign proceeding. Thus, if Swiss law entitled a litigant in a Swiss tribunal to discovery of particular documents located within Switzerland, section 1782 would permit that litigant to seek discovery of the same documents if, by happenstance, they (or their owners) are located within the United States.[12] Congress designed

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[11] *Accord In re Request for Assistance From Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) ("the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance") (citations omitted); *In re Lo Ka Chun*, 858 F.2d 1564, 1566 (11th Cir. 1988) (same); *In re Letter Rogatory From the First Court of First Instance in Civil Matters, Caracas, Venez.*, 42 F.3d 308, 310 (5th Cir. 1995) ("[t]he case law in this area is very clear" in mandating "a discoverability determination when the request for information comes from a private litigant," as distinguished from a foreign government); *see also In re Letter of Request From Crown Prosecution Service of U.K.*, 870 F.2d 686, 693 n.7 (D.C. Cir. 1989) (quoting *Trin. & Tobago*, 848 F.2d at 1156).

[12] Of course, in regular litigation, a U.S. court with jurisdiction over a given multinational company could order that company to produce otherwise discoverable documents within its possession no matter where in the world they are located. But Congress enacted section 1782 to facilitate the production of evidence that, for *jurisdictional* reasons, could not easily be obtained for use in foreign proceedings. The chief context in which section 1782 removes such jurisdictional obstacles is where the evidence sought is in the United States. In contrast, if all the documents

section 1782 to serve that straightforward comity objective: *i.e.*, "bringing the United States to the forefront of nations *adjusting their procedures to those of sister nations* and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects."[13] Congress also expressed its "hope[] that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures" to those of U.S. law. *Id.*

Through such international cooperation, section 1782 is thus designed to diminish the legal significance of a document's (or person's) geographic location. AMD's contrary position would perversely make that accident of geographic location highly material because it would entitle a nonlitigant in a foreign jurisdiction to much more expansive discovery, for ostensible use in that foreign jurisdiction, if the evidence (or person) happens to reside *outside* of that jurisdiction and in the United States instead. That outcome is not only nonsensical from a policy perspective, but is in fact inimical to the very comity objectives section 1782 is designed to promote, as the First, Fifth, and Eleventh Circuits have observed. *See* p. 21 and note 11, *supra*.

The facts of this case vividly illustrate the incompatibility of the Ninth Circuit's view of section 1782 with the comity concerns underlying that provision. European Community law places particular emphasis on precluding mere com-

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AMD sought were located in Europe, AMD could hardly expect to be taken seriously if it came to the United States and invoked section 1782 to circumvent European restrictions on the discovery of those documents for use in a European proceeding.

[13] Letter of Oscar Cox, Chairman, Commission on International Rules of Judicial Procedure, to Hon. John W. McCormack, Speaker, U.S. House of Representatives, May 28, 1963, attached to S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. at 3793 (emphasis added); *accord* 1964 U.S.C.C.A.N. at 3788 (section 1782 is designed to "adjust[]" U.S. discovery procedure "to the requirements of foreign practice and procedure").

plainants from obtaining the proprietary documents of their rivals for several reasons: not just to preclude the type of adversarial environment that the EC strives to avoid, *see* p. 19, *supra*, but also because "[a]ny other solution would lead to the unacceptable consequence that [a company] might be inspired to lodge a complaint with the Commission solely in order to gain access to its competitors' business secrets," *AKZO Chemie*, [1987] 1 C.M.L.R. at 259 (statement of Advocate General of highest EC court). The Ninth Circuit's position would thus divert section 1782 from its intended purpose—accommodating the discovery needs of foreign jurisdictions—and would chart instead "a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation." *Asta Medica*, 981 F.2d at 6. That, indeed, is why the EC itself took the extraordinary step of filing a brief at the petition stage of this case urging the Court to grant certiorari and then another brief at the merits stage urging reversal. As the EC has explained in the latter brief (at 4), the Ninth Circuit's position would "undermine the European Community's carefully balanced policies regarding the disclosure of confidential information," "encourage companies to file pretextual complaints with the Commission solely in order to use Section 1782, wasting the Commission's scarce resources," and threaten basic EC programs "by jeopardizing the Commission's ability to maintain the confidentiality of documents submitted to it."

AMD's request for the *Intergraph* documents in particular reveals an additional dimension of arbitrariness to its section 1782 application. Although AMD is presumably seeking those documents for the benefit of the EC, the EC has made clear that the documents are so inconsequential *to its own investigation* that it rejected AMD's suggestion that the EC itself require Intel to produce them. *See* EC Amicus Br. 6; J.A. 111. AMD claims that it needs the documents anyway, if only because it might someday wish to cite them as a basis for any subsequent challenge in the European Court of First Instance to a possible future decision of the EC not to take action on AMD's complaint. Because that

Court would not *itself* award AMD access to the documents and would review the *nol pros* decision only on the existing record, AMD claims that a failure to obtain the documents now would subject it to a "Catch-22." Br. in Opp. to Cert. 20 n.9. But, as the United States has observed in its own petition-stage amicus brief to this Court (at 19 n.7), there is no Catch-22 here: the reason AMD cannot obtain this discovery is that *European law* does not provide for it, either at the investigation phase or at any subsequent judicial review phase. Indeed, it is undisputed that, even if the documents in question were in Europe, AMD would have no right to them under European law, and it would be in exactly the same position that it occupies under the appropriate reading of section 1782. It would make nonsense of this statute to place AMD in a superior position to obtain invasive discovery simply because the documents happen to be in the United States rather than in the jurisdiction of the forum in which AMD claims a need for them.

2. As explained, the upshot of the Ninth Circuit's decision is that section 1782 imposes civil discovery obligations in circumstances where neither foreign law nor domestic U.S. law would permit such discovery to proceed. Congress did not intend that bizarre result, and—contrary to the Ninth Circuit's reasoning—nothing in the text or legislative history of section 1782 suggests otherwise. Indeed, the text and legislative history point in precisely the opposite direction. *First*, as noted, the very title of section 1782 makes clear that the statute was enacted to render "[a]ssistance to foreign and international tribunals and to *litigants* before such tribunals." 28 U.S.C. § 1782 (emphasis added); *see also Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) ("'the title of a statute . . . [is a] tool[] available for the resolution of a doubt' about the meaning of a statute" (quoting *Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-529 (1947))). AMD, of course, is neither a tribunal nor a litigant: it is a mere complainant. *Second*, the last two sentences of the first paragraph of section 1782(a) explicitly contemplate that the district court will be guided either by "the practice and procedure of the foreign country or the

international tribunal" or by "the Federal Rules of Civil Procedure." 28 U.S.C. § 1782(a). Here, as we have explained, AMD's position would permit discovery that is unauthorized under both EC law and U.S. law.

Third, the 1996 amendment—which Congress added to ensure the availability of discovery to aid foreign "criminal investigations conducted before formal accusation"—reveals Congress's intent to permit pre-litigation discovery in the one context in which it is customary, both here and abroad: in *criminal* investigations, conducted by foreign sovereigns or their agents. Because that clause conspicuously addresses only the criminal setting, Congress indicated that it did not wish to extend private pre-litigation discovery to the civil context, where it is (for all relevant purposes) nonexistent. Indeed, there is no indication that Congress ever contemplated creating new pre-litigation discovery rights in the civil context.

This same distinction—between pre-litigation law enforcement discovery conducted by foreign sovereigns and pre-litigation civil discovery conducted by private persons—appears prominently in the case law as well. Both the Fourth and Fifth Circuits have concluded that, for comity reasons integral to section 1782, the "foreign discoverability" requirement applicable to requests from private parties should not extend to requests from foreign sovereigns. Whereas "courts in the United States have routinely undertaken a discoverability determination when the request for information comes from a private litigant" so as "to avoid assisting a foreign litigant who desires to circumvent the forum nation's discovery rules," that comity rationale "is, by necessity, not present in the case where a foreign court is making a request for information, because the foreign court is, presumably, the arbiter of what is discoverable under its procedural rules." *In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venez.*, 42 F.3d at 310-11; *accord In re Letter of Request from the Amtsgericht Ingolstadt, F.R.G.*, 82 F.3d 590, 592 (4th Cir. 1996).

The legislative history supports these same conclusions. Congress left no trace of any intent to make discovery under section 1782 available to persons other than litigants, foreign sovereigns, and the designated agents of those sovereigns. To the contrary, the Conference Report accompanying the 1964 revisions consistently describes the class of potential section 1782 applicants as foreign tribunals (or officials) and private "litigants before such tribunals." 1964 U.S.C.C.A.N. at 3788.[14]

The same Report puts to rest any question about why Congress used the phrase "any interested person" in the text of section 1782 rather than (as the title suggests) "any litigant." Congress used that language simply because the category of persons entitled to invoke the statute extends beyond litigants to encompass various types of *officials* who might act on behalf of a foreign sovereign: "A request for judicial assistance under the proposed revision may . . . be made in a direct application by an interested person, such as a person designated by or under a foreign law, or a party to

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[14] *Accord id.* at 3783 (section 1782 is designed to "provid[e] equitable and efficacious procedures for the benefit of tribunals and *litigants* involved in *litigation* with international aspects"); *id.* at 3788 (section 1782 "clarifies and liberalizes existing U.S. procedures for assisting foreign and international tribunals and *litigants*"); *id.* at 3789 (application may be filed "by an interested person, such as a person designated by or under a foreign law, or a *party* to the foreign or international *litigation*"); *id.* ("proposed revised subsection (a) permits effective and desirable assistance to foreign and international courts and *litigants* before such courts"); *id.* at 3792 (transmittal letter from the Commission on International Rules of Judicial Procedure) (proposed bill is designed "to improve judicial procedures for serving documents, obtaining evidence, and proving documents in *litigation* with international aspects"); *id.* at 3793 (enactment would "provid[e] equitable and efficacious procedures for the benefit of tribunals and *litigants* involved in *litigation* with international aspects"); *id.* at 3794 (letter from President Kennedy to Congress) ("we have reached the conclusion that the procedural reforms which [the legislation's] enactment would accomplish would be most desirable from the standpoint of the administration of international justice on behalf of private *litigants*") (all emphases added).

the foreign or international litigation." 1964 U.S.C.C.A.N. at 3789; *see also Trin. & Tobago*, 848 F.2d at 1155.

The same conclusion follows from the text of 28 U.S.C. § 1696, a companion provision that Congress enacted as part of the same legislative package that included section 1782. Section 1696 authorizes the district courts to "order service ... in connection with a proceeding in a foreign or international tribunal" pursuant to a "request made[] by a foreign or international tribunal or upon application of *any interested person*." 28 U.S.C. § 1696(a) (emphasis added). The class of private parties qualifying as "interested persons" for those purposes *must* of course be limited to litigants, because private parties—unlike officials designated under foreign law—cannot serve "process" unless they have filed suit.

There is, in sum, no basis for arguing that Congress included the term "any interested person" to create a private-sector analogue to the Freedom of Information Act, such that anyone could invoke section 1782 to scrutinize documents containing the business secrets of a company simply by filing an informal complaint in some foreign jurisdiction, particularly a jurisdiction that has made a policy choice to protect those documents from discovery. Indeed, Congress could not have had any valid basis for giving complainants to foreign law enforcers greater discovery rights than complainants to domestic law enforcers (such as, for example, the Antitrust Division of the Department of Justice)—and, of course, the latter complainants have *no* right to invade the files of the competitive rivals they accuse.

II. Discovery Is Inappropriate Because There Is No Live "Proceeding In A Foreign Or International Tribunal."

Quite apart from the fact that AMD seeks discovery in the U.S. that it could not obtain in Europe, its application under section 1782 is invalid for an independent reason as well: no "proceeding" is now underway "in a foreign or international tribunal," and the prospect that any given "pro-

ceeding" may arise sometime in the future is wholly speculative.

When a party files an antitrust complaint with the EC, the EC conducts a "preliminary investigation," which, as noted, is not "considered an adversarial proceeding." Pet. App. 3a-4a. Only at the conclusion of this "pre-investigation" (J.A. 50) does the EC decide whether the complaint has sufficient merit and significance to warrant more formal prosecutorial action. Pet. App. 4a; *see also* p. 11, *supra*. For purposes of its analysis, the Ninth Circuit accepted that the EC is currently engaged in this first-stage "preliminary investigat[ion]" (Pet. App. 2a); that this preliminary investigation is not itself an "adjudicative" or "quasi-adjudicative" proceeding; that it therefore does not itself qualify as a "proceeding" before a "tribunal" under section 1782; and that no such proceeding is pending now or "imminent." *Id.* at 6a.[15] These facts remain as true today as when the certiorari petition was filed in October 2002: the EC's investigation remains in the same preliminary phase in which it was previously, and the EC has taken none of the procedural steps that must precede the closing of such an investigation.

To be sure, the current "pre-investigation" might someday *lead to* an adjudicative proceeding. As discussed, if the EC declines to pursue a second-phase investigation against Intel, AMD might elect to file suit in the Court of First Instance, which would exercise limited review of that *nol pros* decision. *See* p. 11, *supra*. Also, if the EC were to find enough merit in AMD's complaint to warrant a second-phase investigation, *and* if, after conducting a second-phase investigation, it then decided that Intel had infringed Article 82 of the EC Treaty, Intel would have the option of seeking judi-

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[15] At the petition stage of this case, AMD acquiesced in this characterization of the Ninth Circuit's opinion and, more generally, in Intel's observation that the present first-phase investigation is not itself a "proceeding" before a "tribunal." *See, e.g.*, AMD Br. in Opp. to Cert. 17.

cial review of that prosecutorial decision. At this point, however, any such scenario remains purely speculative. And, as the EC itself observes, "the prospect of judicial review of the Commission's prosecutorial decisions" cannot be "sufficient for a Section 1782 petitioner to claim that discovery is 'for use in a foreign . . . tribunal,'" for that interpretation "would open the statute to discovery requests in connection with virtually *every* administrative agency action, regulation, investigation, license or permit anywhere in the world, so long as the action is ultimately subject to judicial review. Congress cannot have intended such an extreme result." EC Amicus Br. 9 (emphasis in original).

Contrary to the Ninth Circuit's mistaken view (*see* Pet. App. 9a), a second-phase investigation would not *itself* constitute a "proceeding" before a foreign "tribunal," as the EC further confirms (Amicus Br. 5-16). Even in the second phase, as in the first phase, the EC maintains no "separation between the prosecutorial and adjudicative functions"—an established prerequisite to characterizing any proceeding as "adjudicative" for purposes of section 1782. *See In re Letters Rogatory Issued by Dir. of Inspection of Gov't of India*, 385 F.2d 1017, 1020-1021 (2d Cir. 1967) (Friendly, J.). Indeed, the same investigators that conduct "dawn raids" may well prepare the EC's decision at the conclusion of a second-phase investigation. J.A. 91, 96; *see also* p. 12 and note 6, *supra*. Moreover, it is undisputed that the EC does not view such investigations as adversarial; that a complainant has no right to any hearing unless the subject of the investigation asks for one; that no rules of evidence apply; and that no provision is made for taking testimony under oath, for compelling testimony, or for conducting witness cross-examination. *See* pp. 11-12, *supra*. For these reasons, the EC's Eleventh Report on Competition Policy emphasizes that the Commission's "procedure relating to restrictive

practices and abuse of a dominant position is administrative and not judicial; it must not be turned into a trial." J.A. 35.[16]

Given these important differences between adjudications and EC second-stage proceedings, it is no surprise that the EC itself has told this Court that "[a]n accurate understanding of the European Commission's nature and functions should rule out any application of the term 'tribunal' to it." EC Amicus Br. 3; *accord Hasselblad*, [1985] Q.B. at 480 (the EC "is an arm of the executive and nothing like a tribunal"). Indeed, the EC reports that it "is profoundly concerned that characterizing it as a 'tribunal' within the meaning of Section 1782 will have adverse collateral consequences for its ability to protect its prosecutorial and law enforcement prerogatives in other proceedings." EC Amicus Br. 14; *see, e.g.*, *Heintz Van Landewyck S.À.R.L.* v. *E.C. Comm'n*, [1981] 3 C.M.L.R. 134, 224 (holding that the Commission is not a "tribunal" under Article 6(1) of the European Convention on Human Rights, which provides that "[i]n the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal," because "executive power" remains "vested" in the Commission during antitrust investigations).

In any event, the Ninth Circuit's misunderstanding of this issue is compounded by a more basic flaw in its analysis: no second-phase investigation is pending before the EC, and the prospect of a second-phase EC investigation is just as speculative as the prospect of ultimate review in the Court

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[16] *Accord Hasselblad (GB) Ltd.*, [1985] Q.B. at 497 (holding that "the [EC] is acting in a manner which is dissimilar to that of either civil or common law courts of justice" and is "better labelled as administrative rather than judicial or quasi judicial"). The EC confirmed these points not just in its recently filed brief on the merits, but also in its previous brief supporting certiorari at the petition stage, explaining there that it "*never* adjudicates disputes between parties," that "[t]he parties to a complaint cannot be considered 'litigants' before a 'tribunal,'" and that "a complainant ultimately is only a person reporting an alleged violation of the law to a public authority." EC Amicus Br. in Support of Cert. 4-5 (emphasis in original).

of First Instance. The practice of the Second Circuit for many years has been to deny discovery under section 1782 in precisely this type of situation. As that court has held, such discovery is properly limited to circumstances in which adjudicative or quasi-adjudicative proceedings are either underway or at least "imminent—very likely to occur and very soon to occur." *In re Ishihara Chem. Co.*, 251 F.3d 120, 125 (2d Cir. 2001) (internal quotation marks omitted); *accord In re Lancaster Factoring Co.*, 90 F.3d 38, 42 (2d Cir. 1996); *In re Request for Int'l Judicial Assistance (Letter Rogatory) for Federative Republic of Braz.*, 936 F.2d 702, 706 (2d Cir. 1991). The Eleventh Circuit has taken this analysis one step further, suggesting that "a private individual may need to be a litigant in a *pending* proceeding in order to be an 'interested person'" entitled to section 1782 discovery. *Trin. & Tobago*, 848 F.2d at 1155-1156 (emphasis added).

The Eleventh Circuit's suggested approach is the only way to make sense of the statutory language. Before 1996, the first sentence of section 1782(a) was ambiguous as to whether the phrase "document . . . for use in a proceeding" encompassed only documents relevant to an *actual* proceeding already underway or, more broadly, such actual proceedings plus any non-speculative future proceeding to which the discovery sought might be relevant. Congress largely resolved that ambiguity in 1996 by adding the present clause extending the coverage of section 1782 to "includ[e] criminal investigations conducted before formal accusation." 28 U.S.C. § 1782. This new clause would be surplusage if, as the Ninth Circuit held below, courts already had plenary authority before 1996 to order section 1782 discovery well before the commencement of any "proceeding" before a "tribunal." Because Congress is presumed not to have wasted its breath, the addition of this new clause, confined to *criminal* investigations, confirms that no such discovery is appropriate in the *civil* context—where, again, such pre-litigation discovery by private parties is virtually unheard of.

The Ninth Circuit's approach would make nonsense of a related statutory provision as well. In language closely

tracking that of section 1782(a), Congress authorized the district courts in 1994 to grant *pre-litigation* discovery to foreign authorities in aid of foreign antitrust investigations *only* "[o]n the application of the Attorney General . . . in accordance with an antitrust mutual assistance agreement." 15 U.S.C. § 6203(a). That provision too would be redundant if section 1782 already permitted applicants (whether foreign authorities or private parties) to obtain pre-litigation antitrust discovery (along with any other type of civil discovery) from the district courts without first securing the sponsorship of the Attorney General.

AMD has sought to shore up its position by attributing great significance to Congress's deletion in 1964 of the word "pending" from the identification within section 1782 of the foreign "proceeding[s]" for which discovery could be taken.[17] *See* Br. in Opp. to Cert. 15. But if that deletion has significance at all, it shows at most that Congress did not mean to condition discovery on the pendency of a "proceeding" in *all* contexts. As the 1996 amendment later demonstrated, Congress did want to preserve pre-litigation discovery in the criminal context, where it is commonplace. Again, however, it does not follow that Congress wished to create a brand new species of otherwise ubiquitously unavailable pre-litigation *civil* discovery.

In any event, it is doubtful that the deletion of this one word, amid a comprehensive overhaul of the statutory text in 1964, carries any real significance at all. As the Second Circuit has observed:

> [T]he legislative history makes no mention of this change and describes the broadening of proceedings

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[17] As noted, the pre-1964 version of the statute read, in relevant part: "The deposition of any witness residing within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found." *See* p. 5, *supra*.

> in language that raises a question as to whether the deletion of 'pending' was intentional or inadvertent: "The word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings are *pending* before investigating magistrates in foreign countries."

In re Request for Int'l Judicial Assistance, 936 F.2d at 705 (quoting H.R. Rep. No. 88-1052, at 9 (1963)) (emphasis added by court). Although the Second Circuit ultimately concluded that an "imminence" requirement would better suit the underlying statutory purposes than a requirement that proceedings be "pending," it did so not because it thought the legislative history compelled that result, but because it believed such an approach "does no violence to any articulated congressional objective." *Id.* at 706.

Finally, were discovery *not* conditioned on either the pendency or imminence of any "proceeding in a foreign . . . tribunal," there would be no logical stopping point to the speculative nature of the future "proceeding" on which discovery does rest. Indeed, under that approach there would be no reason in principle to keep anyone from obtaining a rival's documents in the United States, even in the absence of a foreign *investigation*, upon declaring a sincere *intention* either to trigger such an investigation by filing an administrative complaint someday or to initiate a lawsuit in a foreign forum at some unspecified future time. That, as noted, would convert section 1782 into a private-sector analogue to FOIA, under which any curious individual or firm, on the thinnest pretext, could raid the files of private companies with a presence in the United States.

III. This Court Should Alternatively Exercise Its Supervisory Authority To Impose Rules Of Practice In The Application Of Section 1782.

As discussed, the discovery request that AMD propounds here is untenable, given that (i) AMD is not a litigant in any foreign "proceeding," (ii) AMD has no right to such discovery under the laws of the sovereign it ostensibly hopes to benefit (the European Commission), and (iii) that sovereign has made clear that it does not want such discovery in any event. AMD nonetheless contends that nothing in the text of section 1782 precludes such discovery and that district courts should remain free to order it under precisely these circumstances.

For the reasons discussed in Points I and II, the text and legislative record of section 1782 make clear by themselves that such discovery would be inappropriate. Moreover, as the EC observes, any doubt on that score should be dispelled by the "strong presumption against any interpretation that undermines international comity." EC Amicus Br. 16 (citing *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963)). There is no good reason to commit the resolution of such internationally significant questions to the ultimate discretion of scores of district courts, each of which would be free to diverge unpredictably with the others on the proper scope of discovery under section 1782. Although the resolution of such issues would often implicate the interests of foreign nations, there is, as the EC points out, "no system for providing [a foreign sovereign] with notice of Section 1782 cases" percolating through the U.S. courts, "much less any regular procedure through which [it] might appear and make those interests known. More important, even if it were feasible for the [foreign sovereign] to appear in every such proceeding, that very notion—that a sovereign government should be obliged to appear regularly in courts across the United States to explain itself and its objections to Section 1782 discovery—is contrary to principles of comity." *Id.* at 17.

For these reasons and others, even if this Court were to disagree that the normal tools of statutory construction compel an appropriately narrow construction of section 1782, it would *not* follow that district courts should remain free in perpetuity to exercise broad discretion in deciding whether to grant such discovery. The two circuit conflicts addressed in this case involve recurring fact patterns, and thus recurring legal questions, in the application of section 1782. This Court can and should exercise its supervisory powers to ensure greater predictability and national consistency in this internationally sensitive area by prescribing generally applicable rules of practice to resolve such cases.

Indeed, appellate courts, including this Court, commonly exercise their inherent supervisory authority to adopt rules of practice for the lower federal courts to follow in deciding procedural issues, such as the discovery issues presented here:

> It cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. Indeed, this Court has acknowledged the power of the courts of appeals to mandate "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution."

Thomas v. *Arn*, 474 U.S. 140, 146-147 (1985) (citation omitted) (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). In the habeas corpus context, for example, this Court has rejected lower-court procedural decisions that "did not contravene the letter" of the governing federal statute, reasoning that the Court can and should impose procedural rules for "channeling the discretion of federal habeas courts" "[i]n light of the profound societal costs that attend the exercise

of habeas jurisdiction."[18] Here, the Court should exercise similar authority to make clear that the Ninth Circuit's philosophy of "liberal discovery" in this area (Pet. App. 8a)—and in particular its approach to each of the two circuit conflicts presented in this case—defeats the very comity objectives underlying section 1782, as the EC observes in its amicus brief.

There are few contexts in which this Court would be *more* justified in exercising such authority. Granting discovery on these facts would, as discussed, disregard fundamental differences between mere *complainants* to law enforcement agencies and actual *litigants*, who enjoy significantly broader rights. Unlike litigants, complainants have no obligation to plead a case that satisfies any standard of legal sufficiency. *See* Br. of Amicus Curiae Chamber of Commerce of the U.S., at 14. Unlike litigants, complainants do not develop evidence for use at trial; they rely on government enforcers to develop evidence and bring a case. And, unlike litigants, complainants have no obligations toward opponents; in fact, they do not even serve them with a complaint. While filing a lawsuit before an adjudicative tribunal is a serious undertaking that triggers ongoing obligations, a mere complaint to a law enforcement agency does not. Indeed, the EC took months to disclose to Intel even a *redacted* copy of AMD's complaint, and neither side has had

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[18] *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (internal quotation marks and citations omitted); *see also McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991) (similar approach in adopting "cause and prejudice" standard). Outside the habeas context, this Court has also articulated and applied non-constitutional, non-statutory rules of practice. *See, e.g., Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978) (per curiam) (adopting non-textually-based rule of practice for Fed. R. Civ. P. 58); *Jencks* v. *United States*, 353 U.S. 657 (1957) (adopting non-constitutional, non-statutory rule of practice for criminal discovery in federal cases); *see generally Dickerson* v. *United States*, 530 U.S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.").

continuing rights of access to the other side's submissions to the EC. *See* p. 13, *supra*.

AMD's approach would open the door to the taking of discovery by non-litigants who are unwilling to assume the burdens and obligations of being a litigant. It would expose individuals and businesses to costly fishing expeditions by rivals. It would subject U.S.-based entities to uniquely one-sided discovery burdens. *See* Br. of Amicus Curiae Product Liability Advisory Council, at 12-16. And it would subvert the foreign legal regime that section 1782 is designed to assist by flouting that regime's mandate that a complainant "may not in any circumstances be given access to documents containing business secrets" of a competitor lest it "lodge a complaint with the Commission solely in order to gain access to its competitors' business secrets," *AKZO Chemie*, [1987] 1 C.M.L.R. at 259. As the EC fears, indulging this "powerful incentive to file pretextual complaints at the [EC]" would "cause a co-equal competition authority to waste precious time and resources on unfounded antitrust complaints." EC Amicus Br. 14.[19] Indeed, the EC adds, "those consequences are so grave that the Commission could be forced to rethink the very structure and future existence of the complaint procedure under European law. Comity is sorely lacking in such a scheme." *Id.* And, on top of these concerns, the Ninth Circuit's approach would have "adverse collateral consequences for [the EC's] ability to protect its prosecutorial and law enforcement prerogatives in other proceedings"—as where, for example, the Commission needs to convey highly dependable assurances to private companies that

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[19] For example, it would enable any company to interfere with mergers subject to cross-border review by complaining to foreign law enforcers and seeking discovery from merging competitors. Hundreds, if not thousands, of such transactions are reviewed each year by the EC and foreign enforcement agencies with similar procedures. Complainants to U.S. antitrust agencies have no right to take discovery of the accused party, but the Ninth Circuit has now conferred that right, under U.S. law, upon complainants abroad.

whatever information they provide about their own complicity in potential antitrust violations will be held in the strictest confidence. *Id.* at 14-15.

There is also no textual basis for limiting the scope of the Ninth Circuit's approach to documentary, as opposed to testimonial, evidence. By its terms, section 1732 permits district courts not just to order U.S. entities "to produce a document or other thing for use" in a foreign proceeding, but also to order any "person . . . to give his testimony or statement" for the same use. Pet. App. 17a. Unlike U.S. jurisdictions, however, the EC has made a conscious and much-discussed decision to make no provision for compelling the testimony of individuals. *See* J.A. 95-96; *see also* J.A. 35 (EC determination that competition investigations must not be turned into trials). Were the Ninth Circuit's approach upheld, competitive rivals of U.S. companies could come to the United States to circumvent deliberate European restrictions not just on documentary discovery, but on testimonial discovery as well.

In sum, by disregarding the principle that private persons must be litigants in adjudicative proceedings in order to obtain section 1782 discovery, the decision below violates the statutory requirement of a "proceeding" before a "tribunal," ignores the unavailability of pre-litigation discovery in civil cases, erroneously conflates criminal investigations and civil disputes, and frustrates clear and repeated expressions of congressional intent. Unless this Court makes clear that discovery under these circumstances is unwarranted, the Ninth Circuit's regime of "liberal discovery" will impose, at the behest of private non-litigants, onerous and potentially one-sided discovery burdens on U.S.-based individuals and businesses, while thwarting the comity interests that section 1782 is designed to serve.

CONCLUSION

The judgment below should be reversed and the case remanded with instructions to deny AMD's application for discovery under section 1782.

Respectfully submitted,

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DECEMBER 2003